UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NATIONAL RIGHT TO LIFE POLITICAL ACTION COMMITTEE STATE FUND, ET AL.,	)	
PLAINTIFFS	)	
v.	)	**Civil No. 96-359-P-H**
JOHN D. DEVINE, ET AL.,	)	
DEFENDANTS	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS (COUNT I)

This is a wide ranging lawsuit in which various plaintiffs challenge the constitutionality of the Maine Clean Elections Act, 21-A M.R.S.A. § 1121 et seq., a voter-sponsored initiative that the Maine Legislature enacted without change in 1996. In this Order, I deal with a particular claim made by the Maine Campowners Association ("MECOA") and the Maine Civil Liberties Union ("MCLU") that lobbyist fees under the Act are unconstitutional. I conclude that under the Tax Injunction Act, any such claim must be brought in the state courts and therefore **GRANT** the defendants' motion to dismiss Count I.

Before the ballot initiative was enacted, Maine statutes provided that lobbyists had to pay at least $200 and lobbyist associates had to pay at least $100 as registration fees with the Commission on Governmental Ethics and Election Practices ("Commission"). The initiative doubled these two minimum fees and provided that one-half the revenue would go the Commission and the other half to the General Fund. See 3 M.R.S.A. § 313, 320.

The two plaintiffs, who engage in lobbying, challenge these fees as "an unlawful tax on the First Amendment activities of MECOA, MCLU and other employers of lobbyists *to the extent the fees are excessive and are used for purposes other than to defray the administrative costs* of lobbyist registration and regulation." Amended Complaint ¶ 33 (emphasis added).

The defendants argue that the plaintiffs' challenge is foreclosed by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, which precludes district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." There is no dispute here over the adequacy of the state remedy; the only issue is whether the lobbyist payment is a tax. Federal law dictates whether or not a required payment is a tax.[1] See Trailer Marine Transport Corp. v. Rivera Vasquez, 977 F.2d 1, 5 (1st Cir. 1992).

If ordinary language usage was the guide, it would be hard to call these lobbyist registration fees a "tax." But ordinary usage is not the guide; instead, the First Circuit has laid out a set of factors to consider in determining what is a tax for TIA purposes:

> '[Courts] have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.'

[1] Because federal law governs the characterization of the payment as a tax or a fee, it is immaterial that the plaintiffs' Amended Complaint calls the registration an "unlawful tax." See Butler v. State of Maine Supreme Judicial Court, 767 F. Supp. 17, 19 (D. Me. 1991) ("[L]abels applied . . . by . . . litigants are not dispositive.).

Cumberland Farms, Inc. v. Tax Assessor, 116 F.3d 943, 946 (1st Cir. 1997) (quoting San Juan Cellular Telephone Co. v. Public Service Comm'n, 967 F.2d 683, 685 (1st Cir. 1992)). I examine, therefore, those factors. On the one hand, the levy here is called a registration fee and falls upon only those who lobby—a very small minority of citizens—and in those respects is unlike a tax. It was imposed, however, not by an administrative agency,[2] but by the legislature after a ballot initiative, and half of it goes directly into the General Fund, by definition for the benefit of the entire community. In these respects it is more like a tax. There is no sign that it serves any regulatory purpose to discourage lobbying. Even the money that goes to the Commission is broadly used for more than regulation of lobbyists. See 1 M.R.S.A. § 1008(6) (stating that "the commission's share of lobbyist registration fees" contributes to such Commission activities as "support[ing] enhanced monitoring [and enforcement of election practices] and computeriz[ing] data collection [to track campaign, election and lobbying information under the commission's jurisdiction]").

The linedrawing is seldom easy. See Cumberland Farms, 116 F.3d at 947 ("[T]he characterization of a governmental assessment as a tax or a fee is rarely a choice between black and white," but rather often "fall[s] into the gray area in the center of the spectrum."). When the case is close,

> '[c]ourts facing cases that lie near the middle of this spectrum have tended . . . to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays [an] agency's cost of regulation.'

Id. at 946 (quoting San Juan Cellular, 967 F.2d at 685). "The most common formula for classifying exactions under the [TIA]" is " asking whether the payment is a tax to raise general revenue or a fee

[2] Although the Commission can increase the fee above the legislative minimum, see 3 M.R.S.A. § 313 (setting the fees as "at least" the legislative amount), it has not done so.

incident to regulation. . . . " Trailer Marine Transport, 977 F.2d at 5. Even that principle is difficult to apply here, however, because half the revenue goes to the General Fund and half to the regulatory agency.

But the nub of the plaintiffs' complaint is the disproportionality between the fee and the Commission's regulatory expenses related to lobbyists. Here, fully half the revenue goes by legislative directive to the General Fund, not the Commission. The plaintiffs concede that a registration fee reflecting regulatory expenses alone is constitutional, and challenge only the amounts over and above a reasonable levy. See Pls.' Mem. Opp. Defs.' Mot. Dismiss at 6 n.3. They are in essence, therefore, challenging the revenue flow to the General Fund and, in that respect, a tax measure. See Hager v. City of West Peoria, 84 F.3d 865, 871-72 (7th Cir. 1996) (using the relationship between the amount of the assessment and the cost of regulation to decide whether the assessment is a fee or a tax).

Since the assessment as challenged is a tax, the TIA deprives this Court of jurisdiction, and it is up to the state courts to deal with the merits of the constitutional claims. The defendants' motion to dismiss Count I is accordingly **GRANTED**.

SO ORDERED.

DATED THIS 8TH DAY OF AUGUST, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE